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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

ELLA L. WIGGINS,
Petitioner,
vs.
ELIZABETH LIGGETT KENNARD,
Respondent.
No. 224.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR RESPONDENT, IN OPPOSITION.

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Opinion Below. The opinion of the Supreme Court of Missouri (not as yet published in the official reports) appears in 160 S. W. (2d) 706.

Petitioner's Statement. The Petitioner's Statement is deficient under Rule 12 and Rule 38 of this Court. It fails to disclose any ruling by the State Court upon any Federal question.

Petitioner's Statement omits essential facts and contains many inaccuracies.

Since this Court will consider only the questions specifically presented by the Petition (Rule 38), we shall, at this point, state only such facts which are omitted from Petitioner's Statement, and which may be necessary in considering the questions presented by the Petition.

Summary Statement Of Matters Necessary In Considering The Questions Presented. Both parties are citizens and residents of Missouri.

The Record, including the opinion of the Supreme Court of Missouri, shows that under the will of John E. Liggett, a resident of Missouri, as construed by the trial Court and the Supreme Court of Missouri, a one-sixth (⅙) interest in certain property had passed to his daughter, Dolly L. Kilpatrick, for her life, with a contingent remainder over on her death to the heirs of her body; that the said Dolly L. Kilpatrick had died on August 10, 1928, and that thereupon the remainder interest in said one-sixth (⅙) interest had vested absolutely in the two heirs of her body, Elizabeth Liggett Kennard (Respondent here) and Mary Lois McIntosh, a one-twelfth (1/12) interest in each (R., p. 247).

It also shows that Ella L. Wiggins (Petitioner here), a sister of Dolly L. Kilpatrick, claimed the said one-sixth (⅙) interest as against the heirs of the body of her deceased sister, and claimed the same under a provision of a decree of the Circuit Court, which had been entered while the three daughters of the testator, life tenants under his will, were alive, and which had purported to direct, while the life tenants were alive, how the then future and contingent interests under his will would go and pass, dependent upon future and contingent events, as such events might thereafter occur.

Said provision had purported to declare that on the death of Dolly L. Kilpatrick the contingent remainder in the said

one-sixth (⅙) interest should not vest in the heirs of her body, but should pass to her sister, Ella L. Wiggins, for her life, with a contingent remainder over on her death to parties not now known or ascertainable, to wit, "the then surviving issue of Ella L. Wiggins and Dolly L. Kilpatrick" (R., p. 245).

The purpose of the instant suit was to have the said provision of said prior decree declared void; to recover the one-twelfth (1/12) interest which had vested in the Plaintiff, as an heir of the body of Dolly L. Kilpatrick on August 10, 1928, and for an accounting of all income therefrom from and after the said date (R., p. 243).

No Federal question was raised in or decided by the Circuit Court. Its decree granted the relief prayed; adjudged the provision of the prior decree to be void; and specifically adjudged:

> "That at the time the decree was entered upon the records of the Circuit Court in the said suit to construe the will of John E. Liggett, all trusts had expired, and that the Court was without jurisdiction to adjudge at the instance of life tenants the interests of prospective contingent remaindermen before such interests had come into existence" (R., p. 81).

A motion for new trial (R., pp. 215-239) raised no Federal question and made no claim that the decision or decree of the trial Court had been arbitrary or violated any constitutional right.

On appeal, the case was fully briefed and argued before the Supreme Court of Missouri, Division No. 1 thereof, consisting of four Judges, aided by three Commissioners, all of whom concurred in the final judgment (R., p. 254).

No Federal question was presented to or was ruled upon by the State Supreme Court.

The opinion of that Court stated that the purpose of the instant suit was to have the provision of the prior decree declared void (R., p. 243).

The opinion also stated:

> "By all the rules of construction the term *heirs of the body*, as used in the Liggett will, paragraph above quoted, means the heirs of the body of a daughter, *at the time* of the death of the daughter, and not at the time of the death of the last surviving daughter. * * * Hence, when Dolly L. Kilpatrick died the 1/6 interest that came to her upon the death of her sister, Cora B. Fowler, vested in her daughter, Mary Lois Perry, now Mary Lois McIntosh, and the present plaintiff [Elizabeth Liggett Kennard], 1/12 interest in each" (R., p. 247);

and also stated:

> "* * * to refuse redress in the present case 'would be a reproach to the administration of justice'" (R., p. 254).

The mandate of the Supreme Court directed that the decree of the trial Court should be "in all things affirmed" (R., p. 243).

The Appellant then filed a motion for rehearing in the Supreme Court of Missouri, but said motion raised no Federal question whatsoever.

Said motion expressly waived the contention theretofore made that the provision of the original decree was binding. Here are the words of that express waiver, as set forth in her first petition for rehearing:

> "The instant Opinion presents two points for the present consideration of counsel for appellant in requesting a rehearing.
>
> "*First.* Whether the Court was free to construe the will because of the contention heretofore made, that the will construction decree is binding on plaintiff.

"*Second.* Was the Opinion correct in limiting the construction of the will to the purely technical point that the statutes were mandatory in determining the intent of the testator?

"Concerning the first point, and in order that there may be no misunderstanding about the sole purpose of this motion, we state at the outset that since it is evident from the Opinion that the Court thinks the will should be construed in order to do equity between the parties, Mrs. Wiggins and her counsel are willing to, and do hereby, waive this point * * *" (R., p. 255).

The said motion for rehearing was based solely upon the point that the Court had erred in construing the will. The motion stated:

"It is this point that constitutes the sole subject matter of this motion for rehearing" (R., p. 257).

It asked for a rehearing

"* * * solely upon the intent of the testator as disclosed by all the provisions of his will * * *" (R., p. 273);

and

"* * * prays that a rehearing be granted upon the construction of the will, as above suggested" (R., p. 274).

On December 16, 1941, the Supreme Court overruled said motion for rehearing without opinion (R., p. 351).

Of its own motion (R., p. 351) that Court modified its opinion in certain respects (R., p. 363), *but not with respect to the construction of the will.*

The Appellant then filed a second motion for rehearing and argued that the decision of the Supreme Court had been arbitrary and had deprived the Appellant of property

without due process of law, in violation of the XIV Amendment to the Federal Constitution (R., p. 364).

The Appellant then moved to have the cause transferred to the Court in Banc, stating as a reason for such motion that "the cause involves a Federal question" (R., p. 380).

Said motion did not state what the Federal question was, but referred to paragraphs II and III of the second motion for rehearing. Paragraphs II and III of said motion had urged that the decision of the Supreme Court had been "erroneous, arbitrary and unjust" (R., pp. 368-369). Neither of said paragraphs mentioned any Federal question.

On February 26, 1942, the Supreme Court overruled the second motion for rehearing and overruled the motion to transfer to the Court in Banc without opinion (R., pp. 392-393); and modified its own opinion, *but not with respect to the construction of the will* (R., p. 405).

The Appellant then filed a third motion for rehearing, in which the Appellant argued that the decision had been arbitrary in voiding the provision of the original decree (R., pp. 409 and 420) and in construing the will.

The Appellant then filed a second motion to transfer the case to the Court in Banc, but said motion asked for such transfer

> "* * * pursuant to the discretionary power vested in this Division by the provisions of the Constitution of the State of Missouri, Article VI, Amendment of 1890, Section 4 * * *" (R., p. 434).

The Court denied both of said motions without opinion (R., p. 441).

The Supreme Court never altered or modified its judgment of affirmance, as entered on July 25, 1941, which directed that the decree of the Circuit Court should be "in all things affirmed" (R., p. 243).

ARGUMENT.

Reasons Why The Writ Should Be Denied.

1) The Petition fails to comply with Rule 12 and Rule 38 and fails to show a substantial Federal question properly presented.

2) The Record shows that the only matters decided by the Circuit Court and the Supreme Court of Missouri were matters of local law:

a) that the provision of the prior decree of the State Circuit Court was without effect as res adjudicata; and

b) that under the will of John E. Liggett, a resident of Missouri, the Plaintiff, Respondent here, had become, on August 10, 1928, the owner of the property which she sought to recover.

A ruling by a State Court as to the effect of a prior decree of a Court of that State as res adjudicata does not present a Federal question.

St. Louis Land Co. vs. Kansas City, 241 U. S. 419;
Phoenix Insurance Co. vs. Tennessee, 161 U. S. 174,

where the Court said:

"* * * if the state court erroneously decides a question of law regarding the weight to be given one of its own judgments in its own courts and among its own citizens, that error is not subject to review by this court, because it constitutes no Federal question."

161 U. S., p. 185.

Such a decision is a matter of State or local law.

Oklahoma Pkg. Co. vs. Gas Co., 309 U. S. 4;
Union & Planters' Bank vs. Memphis, 189 U. S. 71.

The construction of a will for the purpose of ascertaining the intention of the testator is governed by the law of the testator's domicile.

Harrison vs. Nixon, 9 Peters 483.

3) The State Circuit Court and the State Supreme Court ruled that the provision of the original decree was void. It could not, therefore, be binding.

In her first petition for rehearing, the Appellant had expressly waived her contention that it was binding.

Under the law of Missouri, the Appellant's express waiver of the right to make that contention precluded her from claiming anything by reason of it afterwards. Under the law of Missouri, the waiver of a constitutional provision designed for the protection of a property right is valid and binding.

Hayes vs. Manning, 263 Mo. 1, p. 46;
Henderson vs. Koenig, 192 Mo. 690, p. 714.

It follows that Petitioner could not, after her express waiver, complain of the action of the Court in having voided the provision of the original decree.

A party may waive a right, which he might otherwise have under the Constitution of the United States, and the question whether he has or has not lost that right by his waiver is not a Federal one.

Pierce vs. Somerset Ry., 171 U. S., p. 648;
Wall vs. Parrot Silver Co., 244 U. S., p. 411;
Pierce Oil Co. vs. Phoenix Co., 259 U. S., p. 128.

4) It is too late to raise a Federal question for the first time in a petition for rehearing in a Court of last resort of a State after that Court has pronounced its final decision.

McCorquodale vs. Texas, 211 U. S. 432, p. 437;
Holley vs. Georgia, 314 U. S. 576;
Forbes vs. State Council of Virginia, 216 U. S. 396.

5) Since the highest Court of the State did not consider or decide any Federal question, this Court is without any jurisdiction to review its decision.

Penn. R. Co. vs. Ills. Brick Co., 297 U. S. 447, p. 463.

6) Where, under a well-established and reasonable practice, the highest Court of a State will not consider a constitutional question, because such question was not raised in the Circuit Court or properly presented to the highest Court, this Court is without jurisdiction.

Penn. R. Co. vs. Ills. Brick Co., 297 U. S. 447, p. 463.

The decision, which the Appellant (Petitioner) complains of as being arbitrary and unjust, was first rendered by the State Circuit Court.

On appeal to the State Supreme Court, she made no claim that such decision by the State Circuit Court had violated any constitutional right. Her appeal raised no Federal question.

Under the law of Missouri, a constitutional question must be raised at the first opportunity, and the Supreme Court will not consider any constitutional question unless it be timely and properly presented, that is, presented at the first opportunity and preserved in the record.

> "A constitutional question, in order to be available to a party litigant, must be raised at the first opportunity presented in the conduct of the case. If not so presented it will not be available so as to give this court jurisdiction."
>
> Magill vs. Boatmen's Bank, 250 S. W. 41 (Mo. Sup.).

See, also:

McGrath vs. Meyers, 341 Mo. 412,

and in order to properly present any constitutional question, the Section of the Constitution which has been violated must be designated, and the facts which constitute such violation must be narrated.

Robinson vs. Nick, 345 Mo. 305;
Village of Grandview vs. McElroy, 318 Mo. 135.

Therefore, under the established and reasonable practice of Missouri, the State Supreme Court could not consider any constitutional question, and, therefore, this Court is without jurisdiction.

7) The denial of the Appellant's motion to transfer this cause to the Supreme Court of Missouri in Banc, under Article VI, Section 4 of the Amendment of 1890 to the Constitution of Missouri, presents no question for review by this Court.

Said Section is as follows:

> "When the judges of a division are equally divided in opinion in the cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

This Court has specifically ruled that when a Federal question had not been suggested until after judgment and after an application for rehearing had been overruled (which is the exact situation in the instant case), the denial of a motion to transfer to the Supreme Court of Missouri in Banc

> "* * * was in no aspect equivalent to a decision against a right under the Constitution of the United States specially set up or claimed at the proper time and in the proper way."

Duncan vs. Missouri, 152 U. S. 377, p. 383.

The Supreme Court of Missouri has decided that the word "involving," as used in the Constitution in fixing the appellate jurisdiction of that Court, implies that a constitutional question was raised in and submitted to the trial Court, and that such Court had the opportunity to pass upon it.

Bennett vs. Mo. Pac. Ry., 105 Mo. 642.

See, also:

McAllister vs. St. Louis Merch. etc. Ry. Co., 324 Mo. 1005.

It will be noted that under the first clause of the above-quoted Section of the Constitution of Missouri, there are three conditions under which a cause must be transferred to the Court in Banc:

a) where the Judges of a Division are equally divided in opinion;

b) where a Judge of a Division dissents; and

c) where a Federal question is involved.

None of those conditions exists in the present case.

The second clause of said Section gives to a Division *discretionary* power to transfer a cause to the Court in Banc, as follows:

> "* * * or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

Both of Appellant's motions to transfer the cause to the Court in Banc were based upon and addressed to the *discretionary* power of the Court.

Her first such motion

> "* * * prays that the Court exercise the *discretion* vested in it * * * by * * * transferring this cause to the Court in Banc" (R., p. 376). (Italic ours.)

Her second such motion asked that the Court

> "* * * transfer this cause to the Court en Banc pursuant to the *discretionary* power * * *" (R., p. 434). (Italic ours.)

When the Appellant has thus invoked the exercise of the *discretionary* power of a Court, the failure of the Court to exercise such discretionary power cannot, of course, violate any constitutional right of the Appellant.

8) Gorman vs. Washington University, 62 Sup. Ct. Rep. 962,

has no application.

In the Gorman case the opinion of this Court specifically stated that "a federal question is involved" and cited the provision of the Missouri Constitution; showed that no motion to transfer to the Court in Banc had been filed; and held that under the Code, the jurisdiction of this Court was restricted to review a decision

> "by the highest state court in which a decision could be had";

that the Missouri Supreme Court in Banc was the highest Court in which a decision of that Federal question could be had, and, therefore, in the absence of a decision on a Federal question by the Supreme Court in Banc, this Court was without jurisdiction.

In the instant case, however, no Federal question was presented.

No Federal question was ruled upon by the State Supreme Court.

The State Supreme Court decided only matters of local or State law, and, therefore, this Court is without jurisdiction because of the lack of any substantial Federal question properly and timely presented to the State Court.

Facts Not Necessary in Considering the Questions Presented by the Petition, but Which, in and of Themselves, Established the Plaintiff's Right to the Relief Granted by the Decision Below. The right of the Respondent under the will of her ancestor, as adjudged in this case by the Courts of Missouri, is in exact and complete accord with the intention of the testator, as that intention was stated by Mr. Daniel N. Kirby, counsel for Ella L. Wiggins, Petitioner here, to the Supreme Court of Missouri in the original will construction suit.

In the instant case the opinion of the Supreme Court states that in the original will construction suit Mr. Kirby had appeared for Ella L. Wiggins and her two sisters. The opinion quotes from his brief in the Supreme Court as follows:

> "From Mr. Kirby's Brief: 'In case a daughter should die during the trust period, then the remainder of the said subject matter with which the testator was here dealing—the equitable estate during the rest of the trust—should go over to the heirs of the body of the deceased daughter, and in default of such heirs, then to the survivors of the daughters, again with remainders over to the heirs of their bodies'" (R., p. 251).

The opinion also shows that on the appeal in the original will construction suit counsel had not informed the Supreme Court as to the provision in the decree, which contradicted that intention (R., p. 404).

In the instant case, Mr. Kirby, when placed upon the stand by the Plaintiff (Respondent here), testified as follows:

> "'I don't think, Mr. Bakewell, there is any doubt about what the phrase "heirs of the body" means technically in law. It means the people who will succeed on the death of an intestate ancestor'" (R., p. 111).

He also testified:

> " 'Q. When did Mrs. Kilpatrick die? A. She died in August of the same year.
>
> " 'Q. August, 1928? A. Yes.
>
> " 'Q. Did she leave heirs of her body? A. Yes.
>
> " 'Q. Who were they? A. One of them was her daughter, then Mrs. Perry, Lois Kilpatrick Perry, and the other is the granddaughter, who is the plaintiff in this case' " (R., p. 109).

It, therefore, appears that the Petitioner is asking this Court to review a decision by the highest Court of Missouri, which construed the will of her father in exact accord with his intention, as stated by her own counsel in his brief in the Supreme Court of Missouri; and which decision gave to the phrase "heirs of the body" the exact meaning which her own counsel testified that phrase "means technically in law."

In The Original Will Construction Suit There Was No Hearing On The Devolution Of The Contingent Remainders If A Daughter Should Die Without Issue. This Court has decided:

> "The hearing is the hearing of evidence and argument."
>
> Shields vs. Utah R. Co., 305 U. S., p. 182.

The Defendant (Petitioner) avers in her answer here that in the original suit said point was not argued in the Supreme Court of Missouri (R., p. 45). The Supreme Court of Missouri has stated that in the original suit it had not ruled upon that point (R., p. 359).

The Judge who presided at the trial of the original suit has testified that the point was not argued in the trial Court (R., p. 134), and Petitioner has so stipulated (Phys. Ex., p. *521).

Since there was no argument of the point, and since there was no hearing thereof, there could be no valid decision thereof.

The Provision Of The Decree Of The Circuit Court In The Original Case Was The Result of a "Supposed Agreement." The Judge of the trial Court, who had decided the original will construction suit, testified that "the substance of his finding" which was the "basis for the decree to be prepared by counsel" (R., p. 135) was the following:

"In the Circuit Court, City of St. Louis,

December 30, 1921.

"Ella L. Wiggins et al.
vs.
Mary Lois Perry et al.

Finding by the court construing the will of John E. Liggett, deceased, to the effect that the plaintiffs take life estates only under said will, with contingent remainders over in favor of the *heirs*, if any, *of the bodies of plaintiffs respectively*, per stirpes and not per capita; counsel for defendants to draft form of decree; decree to be entered upon said draft when approved by Court and filed.

(sgd.) Franklin Miller,
Judge."
(R., p. 134.)

It will be noted that said Finding did not attempt to decide how the contingent remainders would pass if a daughter should die without issue.

On that point, which had not been decided by the Circuit Court, Mr. Reber, who was counsel for the guardian ad litem of this Respondent (then a minor), and Mr. Kirby, counsel for Petitioner, "agreed" (Phys. Ex., p. *522), and,

as a result of their agreement, the provision which purported to deprive the heirs of the body of Dolly L. Kilpatrick of their estates appears as a part of the decree of the Circuit Court, which decree covers fifty-five printed pages (Phys. Ex., pp. *223-277).

In holding invalid a decree obtained under almost similar circumstances, this Court said that such a decree was "in outward semblance a decision of a court," but that "in essential character it is but the judicially recorded supposed agreement."

Gay vs. Parpart, 106 U. S., p. 699.

The Subsequent Statements, Both By Mr. Reber and By Mr. Kirby, Establish That the Provision—The Result Of Their "Supposed Agreement"—Was Wrong. In the instant case the opinion of the Supreme Court of Missouri establishes that in the will construction suit both Mr. Reber and Mr. Kirby had stated in their briefs in the Supreme Court that the testator intended that if a daughter should die without issue, her one-third (⅓) should pass in equal portions to her surviving sisters for life, with remainders over to the heirs of their respective bodies (R., p. 253). The opinion quoted the statements from the brief of Mr. Reber (R., p. 250) and from the brief of Mr. Kirby (R., p. 251).

Those Counsel Did Not Fully Advise The Supreme Court. In the instant case the opinion of the Supreme Court of Missouri establishes that in the will construction suit counsel had not advised the Supreme Court as to the paragraph in the decree, which was contrary to the intention (R., p. 253).

The Briefs Mislead The Supreme Court. That the briefs of counsel had caused an erroneous impression on the Su-

preme Court in the will construction suit is established by the opinion of the Supreme Court of Missouri in the instant case. That opinion said:

> "No Judge, by reading the briefs in the will construction suit appeal, would even suspect such a construction as that contained in the challenged paragraph of the decree" (R., p. 251).

Why Mrs. Wiggins, Petitioner Here, Did not Present The Provision Of The Decree To The Supreme Court Of Missouri. In her answer in this case, Mrs. Wiggins avers that in the will construction suit she did not present the paragraph of the decree to the Supreme Court of Missouri (R., p. 45) because it had held that if one daughter died without issue, leaving two sisters surviving, *the latter would take successive life estates* and she "did not desire to have that provision reviewed or altered" (R., pp. 45-46).

Thus in the clearest language the Petitioner avers that in the will construction suit she had not presented for review a provision of the decree of the trial Court, because she did not wish to have that provision reviewed or altered, but that provision had given to her (Mrs. Wiggins) a successive life estate in the very property which her counsel had told the Supreme Court the testator intended to go to the heirs of the body of her sister.

Conclusion.

The Record shows, therefore:

1) That no Federal question was properly and timely presented to the State Courts, and that no Federal question was decided by them.

2) That the Petitioner seeks a review of a decision by the Courts of Missouri, which construed the will of her father. But such decision construing the will is in exact

accord with her own statements as made to the Supreme Court itself in the original will construction suit, which had been filed by her.

3) That the Petitioner seeks a review of a ruling by the Supreme Court of Missouri, which had denied her contention that the provision of the prior decree was binding. But Petitioner's express waiver of that contention, as made in the Supreme Court of Missouri, deprives her of any right to a review by any Court of that ruling.

For the reasons set forth in the above brief, it is respectfully submitted that the Petition for Writ of Certiorari to the Supreme Court of Missouri should be denied.

Respectfully submitted,

PAUL BAKEWELL, JR.,
Counsel for Respondent.